Rethink Harvard’s sexual harassment policy

In July, Harvard University announced a new university-wide policy aimed at preventing sexual harassment and sexual violence based on gender, sexual orientation, and gender identity.
The new policy, which applies to all schools within the university and to all Harvard faculty, administrators, and students, sets up the Office for Sexual and Gender-Based Dispute Resolution to process complaints against students. Both the definition of sexual harassment and the procedures for disciplining students are new, with the policy taking effect this academic year. Like many universities across the nation, Harvard acted under pressure imposed by the federal government, which has threatened to withhold funds for universities not complying with its idea of appropriate sexual harassment policy.

In response, 28 members of the Harvard Law School Faculty have issued the following statement:

AS MEMBERS of the faculty of Harvard Law School, we write to voice our strong objections to the Sexual Harassment Policy and Procedures imposed by the central university administration and the Corporation on all parts of the university, including the law school.

We strongly endorse the importance of protecting our students from sexual misconduct and providing an educational environment free from the sexual and other harassment that can diminish educational opportunity. But we believe that this particular sexual harassment policy adopted by Harvard will do more harm than good.

As teachers responsible for educating our students about due process of law, the substantive law governing discrimination and violence, appropriate administrative decision-making, and the rule of law generally, we find the new sexual harassment policy inconsistent with many of the most basic principles we teach. We also find the process by which this policy was decided and imposed on all parts of the university inconsistent with the finest traditions of Harvard University, of faculty governance, and of academic freedom.

Among our many concerns are the following:

**Harvard has adopted procedures** for deciding cases of alleged sexual misconduct which lack the most basic elements of fairness and due process, are overwhelmingly stacked against the accused, and are in no way required by Title IX law or regulation. Here our concerns include but are not limited to the following:

- The absence of any adequate opportunity to discover the facts charged and to confront witnesses and present a defense at an adversary hearing.

- The lodging of the functions of investigation, prosecution, fact-finding, and appellate review in one office, and the fact that that office is itself a Title IX compliance office rather than an entity that could be considered structurally impartial.

- The failure to ensure adequate representation for the accused, particularly for students unable to afford representation.

**Harvard has inappropriately** expanded the scope of forbidden conduct, including by:

- Adopting a definition of sexual harassment that goes significantly beyond Title IX and Title VII law.

- Adopting rules governing sexual conduct between students both of whom are impaired or incapacitated, rules which are starkly one-sided as between complainants and respondents, and entirely inadequate to address the complex issues in these unfortunate situations involving extreme use and abuse of alcohol and drugs by our students.
Harvard has pursued a process in arriving at its new sexual harassment policy which violates its own finest traditions of academic freedom and faculty governance, including by the following:

■ Harvard apparently decided simply to defer to the demands of certain federal administrative officials, rather than exercise independent judgment about the kind of sexual harassment policy that would be consistent with law and with the needs of our students and the larger university community.

■ Harvard failed to engage a broad group of faculty from its different schools, including the law school, in the development of the new sexual harassment policy. And Harvard imposed its new sexual harassment policy on all the schools by fiat without any adequate opportunity for consultation by the relevant faculties.

■ Harvard undermined and effectively destroyed the individual schools’ traditional authority to decide discipline for their own students. The sexual harassment policy’s provision purporting to leave the schools with decision-making authority over discipline is negated by the university’s insistence that its Title IX compliance office’s report be totally binding with respect to fact findings and violation decisions.

We call on the university to withdraw this sexual harassment policy and begin the challenging project of carefully thinking through what substantive and procedural rules would best balance the complex issues involved in addressing sexual conduct and misconduct in our community.

The goal must not be simply to go as far as possible in the direction of preventing anything that some might characterize as sexual harassment. The goal must instead be to fully address sexual harassment while at the same time protecting students against unfair and inappropriate discipline, honoring individual relationship autonomy, and maintaining the values of academic freedom. The law that the Supreme Court and lower federal courts have developed under Title IX and Title VII attempts to balance all these important interests. The university’s sexual harassment policy departs dramatically from these legal principles, jettisoning balance and fairness in the rush to appease certain federal administrative officials.

We recognize that large amounts of federal funding may ultimately be at stake. But Harvard University is positioned as well as any academic institution in the country to stand up for principle in the face of funding threats. The issues at stake are vitally important to our students, faculties, and entire community.

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